

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LAURA SATERBAK, individually and on
behalf of a class of persons similarly situated,

Plaintiff,

v.

MTC FINANCIAL INC., dba TRUSTEE
CORPS, FEDERAL HOME LOAN
MORTGAGE CORPORATION, FLAGSTAR
BANK, JOAN H. ANDERSON, and DOES 1
through 100,

Defendants.

3:10-cv-501-RCJ-VPC

ORDER

Currently before the Court are MTC Financial Inc. dba Trustee Corp's ("Trustee Corps") Motion to Dismiss (#6), Federal Home Loan Mortgage Corporation's ("Freddie Mac") Motion to Dismiss (#12), and Flagstar Bank, FSB ("Flagstar") and Joan H. Anderson's Motion to Dismiss (#23).

The Court heard oral argument on January 18, 2011.

BACKGROUND

I. Foreclosure Documents¹

Plaintiff Laura D. Saterbak executed a note secured by a deed of trust on a piece of property located at 900 S. Meadows Pkwy., Unit 2722, Reno, Nevada, which was recorded in

¹ Trustee Corps and Freddie Mac each filed a request for judicial notice and attached copies of relevant publicly recorded documents. (See Request for Judicial Notice (#7, 13)). The Court grants the request for judicial notice. See *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004) (the court may take judicial notice of the records of state agencies and other undisputed matters of public record under Fed. R. Evid. 201).

1 Washoe County on July 13, 2007. (Deed of Trust (#7-1) at 2-3, 5). The mortgage, dated July
2 5, 2007, was for \$266,400. (*Id.* at 4). The lender on the deed of trust was Flagstar. (*Id.*). The
3 trustee on the deed of trust was Joan H. Anderson. (*Id.*). The Mortgage Electronic
4 Registration System, Inc. ("MERS") was named as "a nominee for Lender and Lender's
5 successors and assigns" and claimed to be the beneficiary² under the security instrument.
6 (*Id.*).

7 On February 1, 2009, Plaintiff defaulted on her mortgage payments for an unspecified
8 amount. (See Notice of Default (#7-2) at 3). On June 3, 2009, MERS, as a nominee for the
9 lender, executed a Substitution of Trustee and replaced Trustee Corps as the trustee for
10 Anderson. (Substitution of Trustee (#7-3) at 2-3).³

11 On June 4, 2009, First American Title Insurance Company ("First American") filed a
12 notice of default and election to sell with the Washoe County Recorder's office. (Notice of
13 Default (#7-2) at 2, 4). First American was acting as an agent of Trustee Corps which, in turn,
14 was acting as an agent for MERS, who was acting as a nominee for the lender. (*Id.* at 4). The
15 notice of default named Trustee Corps as the substituted trustee under the deed of trust. (*Id.*
16 at 3). The notice of default identified the breach of obligations as "the installment of principal
17 and interest which became due on 02/01/2009 and all subsequent installments of principal and
18 interest, along with late charges, plus foreclosure costs and legal fees." (*Id.*).

19 On June 4, 2009, MERS executed an assignment of deed of trust and granted Freddie
20 Mac all beneficial interest under the deed of trust. (Assignment of Deed of Trust (#7-5) at 2).⁴

21 On September 8, 2009, Trustee Corps recorded a notice of trustee's sale with the
22 Washoe County Recorder's office. (Notice of Trustee's Sale (#7-4) at 2). On January 27,
23 2010, Trustee Corps recorded a trustee's deed upon sale which explained that Trustee Corps

24
25 ² Despite the wording of the deed of trust, MERS is not a beneficiary to the deed of
trust. See *Gomez v. Countrywide Bank, FSB*, 2009 WL 3617650 at *2 (D. Nev. 2009).

26 ³ The Substitution of Trustee was recorded on June 25, 2009, after the substituted
27 trustee filed a notice of default. (See Substitution of Trustee (#7-3) at 2).

28 ⁴ The Assignment of Deed of Trust was recorded on January 27, 2010. (See
Assignment of Deed of Trust (#7-5) at 2).

1 had sold the property to Freddie Mac for \$170,160 at a public auction on January 12, 2010.
2 (Trustee's Deed Upon Sale (#7-6) at 2-3).

3 **II. The Complaint**

4 In August 2010, Flagstar filed a petition for removal and attached Plaintiff's complaint
5 from the Second Judicial District Court in Washoe County. (Petition for Removal (#1, 1-2)).
6 In the complaint, Plaintiff sued Trustee Corps, Freddie Mac, Flagstar, and Anderson.
7 (Complaint (#1-2) at 8). Plaintiff's complaint listed six causes of action. (*Id.* at 5).

8 In the first cause of action, Plaintiff accused Flagstar and Trustee Corps of violating
9 state foreclosure law. (*Id.* at 17). Plaintiff asserted that her obligation to pay her mortgage
10 was discharged when investors in the mortgage-backed securities claims were paid as a result
11 of federal bailout funds or other monies paid to investors who owned her note. (*Id.*). She
12 alleged that she was not insisting that she did not have to repay her loan, but rather that no
13 money was owed to the defendants for the loan. (*Id.* at 17-18). She asserted that no entity
14 that had a right to payment from her had ever declared her in default. (*Id.* at 18). She also
15 asserted that MERS was not a proper beneficiary or nominee and that Flagstar and Trustee
16 Corps were not beneficiaries of the note. (*Id.*). She claimed that Trustee Corps failed to give
17 notice, in the notice of default, of her arrearage and what amount would be required to bring
18 the loan current. (*Id.* at 19). She asserted that the notice of default was defective and violated
19 NRS § 107.080. (*Id.*).

20 In the second cause of action, Plaintiff alleged that all defendants conspired to violate
21 Nevada's non-judicial foreclosure law. (*Id.* at 20). Specifically, she asserted that all
22 defendants knew that she would not be qualified for the loan, that the deed of trust would not
23 be transferred with the promissory note, that foreclosure on the home was highly likely, that
24 foreclosure would be initiated by a party who was not the trustee of the deed, and that Flagstar
25 would not modify her loan and would tell her not to make payments so they could foreclose
26 on the property. (*Id.* at 20-21).

27 In the third cause of action, Plaintiff alleged fraud in the inducement against Flagstar
28 and Anderson. (*Id.* at 21). She alleged that they failed to disclose during the execution of the

1 closing papers that the loan was a sub-prime loan, that she was not qualified to enter the loan,
2 and that there would be a catastrophic drop in real estate values. (*Id.*). She asserted that they
3 concealed the true terms of the loan, the risk of the transaction, the risk of default, and the risk
4 of foreclosure. (*Id.* at 21-22). She contended that Flagstar induced her to make payments
5 when the defendants had already foreclosed on her property. (*Id.* at 22).

6 In the fourth cause of action, Plaintiff alleged unjust enrichment against all defendants.
7 (*Id.* at 24). She alleged that they engaged in a deceptive scheme that unjustly enriched
8 themselves because they received monetary payments from her even though they did not fund
9 her loan. (*Id.*). She asserted that she would not have continued to make payments on her
10 loan had the defendants properly disclosed the discharge of her note to investors. (*Id.* at 24-
11 25). She claimed that the defendants should return all of her funds to her, including her down
12 payment. (*Id.* at 25-26).

13 In the fifth cause of action, Plaintiff alleged that Flagstar breached the covenant of good
14 faith and fair dealing in contracts. (*Id.* at 26). Plaintiff asserted that when she requested a
15 loan modification, Flagstar told her to stop making payments on the mortgage. (*Id.*). She
16 claimed that while she and Flagstar were communicating about a loan modification and
17 exchanging financial information, Flagstar recorded a notice of default and initiated the
18 foreclosure process on her property. (*Id.*). She asserted that after the trustee's sale was
19 completed, Flagstar told her that she would not qualify for the loan modification. (*Id.*). She
20 alleged that she submitted personal financial information in the belief she would qualify for a
21 loan modification but alleged that Flagstar had no intention of ever modifying her loan. (*Id.*).

22 In the sixth cause of action, Plaintiff alleged slander of title against Trustee Corps and
23 Freddie Mac. (*Id.* at 27). She asserted that defendants knew that they did not have any
24 grounds to believe that she owed them any money on the note, that they did not know who the
25 actual investors on the note were, and that they did not know whether the note had been paid
26 in part or discharged. (*Id.*). She contended that Trustee Corps was not the trustee of the deed
27 of trust and was not authorized to foreclose. (*Id.*).

28 Plaintiff sought relief in the form of declaratory relief, reformation, and quiet title. (*Id.*

1 at 28-29).

2 Defendants now file motions to dismiss.

3 LEGAL STANDARD

4 When considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the
5 court must accept as true all factual allegations in the complaint as well as all reasonable
6 inferences that may be drawn from such allegations. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150
7 n.2 (9th Cir. 2000). Such allegations must be construed in the light most favorable to the
8 nonmoving party. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). In general, the
9 court should only look to the contents of the complaint during its review of a Rule 12(b)(6)
10 motion to dismiss. However, the court may consider documents attached to the complaint or
11 referred to in the complaint whose authenticity no party questions. *Id.*; see *Durning v. First*
12 *Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987).

13 The analysis and purpose of a Rule 12(b)(6) motion to dismiss for failure to state a
14 claim is to test the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th
15 Cir. 2001). The issue is not whether a plaintiff will ultimately prevail but whether the claimant
16 is entitled to offer evidence to support the claims. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246,
17 249 (9th Cir. 1997) (quotations omitted). To avoid a Rule 12(b)(6) dismissal, a complaint does
18 not need detailed factual allegations; rather, it must plead "enough facts to state a claim to
19 relief that is plausible on its face." *Clemens v. Daimler Chrysler Corp.*, 534 F.3d 1017, 1022
20 (9th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955,
21 1964, 167 L.Ed.2d 929 (2007)); *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949, 173
22 L.Ed.2d 868 (2009) (stating that a "claim has facial plausibility when the plaintiff pleads factual
23 content that allows the court to draw the reasonable inference that the defendant is liable for
24 the misconduct alleged"). Even though a complaint does not need "detailed factual
25 allegations" to pass muster under 12(b)(6) consideration, the factual allegations "must be
26 enough to raise a right to relief above the speculative level . . . on the assumption that all the
27 allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555, 127
28 S.Ct. at 1965. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the

1 elements of a cause of action will not do." *Iqbal*, ___ U.S. at ___, 129 S.Ct. at 1949. "Nor
 2 does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual
 3 enhancements.'" *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. at 1966).

4 If the court grants a motion to dismiss a complaint, it must then decide whether to grant
 5 leave to amend. The court should "freely give" leave to amend when there is no "undue delay,
 6 bad faith or dilatory motive on the part of the movant . . . undue prejudice to the opposing party
 7 by virtue of allowance of the amendment, [or] futility of amendment." Fed. R. Civ. P. 15(a);
 8 *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). Generally,
 9 leave to amend is only denied when it is clear that the deficiencies of the complaint cannot be
 10 cured by amendment. See *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir.
 11 1992).

12 DISCUSSION

13 I. Violation of Nevada Foreclosure Law (Claim One) & Conspiracy to Violate Nevada 14 Foreclosure Law (Claim Two)

15 Nevada law provides that a deed of trust is an instrument that may be used to "secure
 16 the performance of an obligation or the payment of any debt." NRS § 107.020. Upon default,
 17 the beneficiary, the successor in interest of the beneficiary, or the trustee may foreclose on
 18 the property through a trustee's sale to satisfy the obligation. NRS § 107.080(2)(c).

19 The procedures for conducting a trustee's foreclosure sale are set forth in NRS
 20 § 107.080. To commence a foreclosure, the beneficiary, the successor in interest of the
 21 beneficiary, or the trustee must execute and record a notice of the breach and election to sell.
 22 NRS § 107.080(2)(c). The notice of default and election to sell must "[d]escribe the deficiency
 23 in performance or payment and may contain a notice of intent to declare the entire unpaid
 24 balance due if acceleration is permitted by the obligation secured by the deed of trust." *Id.*
 25 § 107.080(3)(a). If the property is a residential foreclosure, the notice of default and election
 26 to sell must comply with NRS § 107.087. *Id.* § 107.080(3)(b). Nevada Revised Statute
 27 § 107.087 provides that the notice of default and election to sell must include the physical
 28 address of the property and the contact information of the trustee or the person conducting

1 the foreclosure who is authorized to provide information relating to the foreclosure status of
2 the property. NRS § 107.087(1)(b)(1)-(2).

3 The trustee or other person authorized to make the sale must wait three months after
4 recording the notice of default and election to sell. NRS § 107.080(2)(d). After the three
5 month period, the trustee must give notice of the time and place of the sale. *Id.* § 107.080(4).
6 Under NRS § 107.080(5), a "sale made pursuant to this section may be declared void by any
7 court of competent jurisdiction in the county where the sale took place if . . . [t]he trustee or
8 other person authorized to make the sale does not substantially comply with the provisions of
9 this section." *Id.* § 107.080(5)(a).

10 A nominee on a deed of trust has the authority, as an agent, to act on behalf of the
11 holder of the promissory note and execute a substitution of trustees. *Gomez v. Countrywide*
12 *Bank, FSB*, 2009 WL 3617650, * 1 (D. Nev. 2009). As long as the note is in default and the
13 foreclosing trustee is either the original trustee or has been substituted by the holder of the
14 note or the holder's nominee, there is no defect in the Nevada foreclosure. *Id.* at *2.

15 In this case, Trustee Corps had the authority to initiate the foreclosure process against
16 Plaintiff because Trustee Corps had been properly substituted as the trustee. Specifically, on
17 June 3, 2009, MERS, as a nominee of the holder of the note, executed a substitution of
18 trustee and replaced Trustee Corps as the substituted trustee for Anderson. (See Substitution
19 of Trustee (#7-3) at 2). The next day, Trustee Corps, as the substituted trustee, filed and
20 recorded a notice of default. (See Notice of Default (#7-2) at 2, 4). Trustee Corps's notice of
21 default and election to sell complied with NRS § 107.080(3)(a) because it described the
22 deficiency in performance, "the installment of principal and interest which became due on
23 02/01/2009 and all subsequent installments of principal and interest." (See *id.* at 3). Nevada
24 Revised Statute § 107.080(3)(a) requires the notice of default to identify either the deficiency
25 in performance or the deficiency in payment. See NRS § 107.080(3)(a). Therefore, Trustee
26 Corps was not required to identify the arrearage and the amount to bring the loan current.
27 Thus, Plaintiff has failed to state a claim upon which relief can be granted because Trustee
28 Corps properly listed the deficient performance in the notice of default. The Court grants

1 Trustee Corps and Flagstar's motions to dismiss claim one. Furthermore, because there was
 2 no violation of NRS § 107.080, the Court finds that there was no conspiracy to violate Nevada
 3 foreclosure law and grants all parties' motions to dismiss claim two.

4 **II. Fraud in the Inducement (Claim Three)**

5 In Nevada, the elements of common law fraud are: (1) a false representation by the
 6 defendant; (2) defendant's knowledge or belief that the representation is false (or insufficient
 7 basis for making the representation); (3) defendant's intention to induce the plaintiff to act or
 8 to refrain from acting in reliance upon the misrepresentation; (4) plaintiff's justifiable reliance
 9 upon the misrepresentation; and (5) damage to the plaintiff resulting from such reliance.

10 *Bulbman, Inv. v. Nevada Bell*, 825 P.2d 588, 592 (Nev. 1992).

11 "In alleging fraud or mistake, a party must state with particularity the circumstances
 12 constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's
 13 mind may be alleged generally." Fed. R. Civ. P. 9(b). Rule 9(b) requires "an account of the
 14 time, place, and specific content of the false representations as well as the identities of the
 15 parties to the misrepresentations." *Swartz v. KPMG, LLP*, 476 F.3d 756, 764 (9th Cir. 2007)
 16 (quotation omitted). To comply with the rule, the allegations "must be specific enough to give
 17 defendants notice of the particular misconduct which is alleged to constitute the fraud charged
 18 so that they can defend against the charge and not just deny that they have done anything
 19 wrong." *Id.* Rule 9(b) requires plaintiffs to inform each defendant separately of the allegations
 20 surrounding the alleged fraud participation. *Id.* at 764-65. The plaintiff must also set forth an
 21 explanation as to why the statement or omission complained of was false or misleading. *In*
 22 *re Stac Elec. Sec. Litig.*, 89 F.3d 1399, 1404 (9th Cir. 1996).

23 In this case, Plaintiff does not plead with the particularity required by Rule 9(b). Plaintiff
 24 makes generalized allegations of fraud against Flagstar and Anderson, but never identifies the
 25 specific content of their false representations. (See Complaint (#1-2) at 21-22). Instead,
 26 Plaintiff alleges that they failed to inform her what would happen to her note and deed of trust
 27 after she executed the loan documents and that they should have informed her that she was
 28 making a risky transaction. (See *id.*). However, the deed of trust specifically stated that the

1 "Note or a partial interest in the Note (together with the Security Instrument) [could] be sold
2 one or more times without prior notice to Borrower." (See Deed of Trust (#7-1) at 14, ¶ 20).
3 Thus, she fails to allege how the omission was misleading. Additionally, a cause of action for
4 fraud does not lie for bad financial advice.

5 Plaintiff does allege that Flagstar induced her to make payments when her property had
6 already been foreclosed on. (See Complaint (#1-2) at 22, ¶ 77). However, she fails to allege
7 anything more and, thus, fails to state with particularity a cause of action for fraud in the
8 inducement. Accordingly, the Court grants Flagstar and Anderson's motion to dismiss claim
9 three.

10 **III. Unjust Enrichment (Claim Four)**

11 In Nevada, the elements of an unjust enrichment claim or "quasi contract" are: (1) a
12 benefit conferred on the defendant by the plaintiff; (2) appreciation of the benefit by the
13 defendant; and (3) acceptance and retention of the benefit by the defendant (4) in
14 circumstances where it would be inequitable to retain the benefit without payment.
15 *Leasepartners Corp. v. Robert L. Brooks Trust*, 942 P.2d 182, 187 (Nev. 1997). Unjust
16 enrichment is an equitable substitute for a contract. *DaSilva v. Wells Fargo Bank, N.A.*, 2010
17 WL 3910139 at *8 (D. Nev. 2010). Therefore, an action for unjust enrichment cannot lie where
18 there is an express written agreement. *Id.*

19 Here, Plaintiff's loan documents created an express, written agreement upon which
20 Plaintiff bases a majority of her claims. There can be no agreement implied when there is an
21 express agreement. Accordingly, the Court grants Trustee Corps, Flagstar, and Anderson's
22 motions to dismiss Plaintiff's fourth claim. The Court also grants Freddie Mac's motion to
23 dismiss claim four because Plaintiff fails to allege how Freddie Mac is unjustly retaining
24 property it purchased for \$170,160 during the valid foreclosure process. Therefore, Plaintiff
25 fails to plead sufficient facts to state a claim for unjust enrichment against Freddie Mac.

26 **IV. Breach of the Covenant of Good Faith and Fair Dealing (Claim Five)**

27 Under Nevada law, every contract imposes upon each party a duty of good faith and
28 fair dealing in its performance and execution. *A.C. Shaw Constr., Inc. v. Washoe County*, 784

1 P.2d 9, 9 (Nev. 1989). To state a claim for breach of the covenant of good faith and fair
2 dealing against Flagstar, plaintiff must allege: (1) plaintiff and defendant were parties to an
3 agreement; (2) the defendant owed a duty of good faith to the plaintiff; (3) the defendant
4 breached that duty by performing in a manner that was unfaithful to the purpose of the
5 contract; and (4) the plaintiff's justified expectations were denied. See *Perry v. Jordan*, 900
6 P.2d 335, 338 (Nev. 1995).

7 Here, Plaintiff fails to state a claim for breach of the covenant of good faith and fair
8 dealing because no loan modification contract existed between Plaintiff and Flagstar.
9 Plaintiff's claim is based on Flagstar's failure to grant a loan modification based on oral
10 negotiations. (See Complaint (#1-2) at 26). Accordingly, the Court grants Flagstar's motion
11 to dismiss claim five.

12 **V. Slander of Title (Claim Six)**

13 In Nevada, a cause of action for slander of title requires that "words spoken be false,
14 that they be maliciously spoken and that the plaintiff sustain some special damage as a direct
15 and natural result of their having been spoken." *Rowland v. Lepire*, 662 P.2d 1332, 1335
16 (Nev. 1983). "In order to prove malice it must be shown that the defendant knew that the
17 statement was false or acted in reckless disregard of its truth or falsity." *Id.* The first element
18 is satisfied if the defendant records a false document. *Kim v. Kearney*, 2010 WL 3603651 at
19 *5 (D. Nev. 2010). A deed of trust that should have been cancelled is a false document. *Id.*

20 As discussed above, Trustee Corps had the authority to initiate the foreclosure process
21 against Plaintiff because Trustee Corps had been properly substituted as the trustee.
22 Additionally, Plaintiff never alleges that she was not in default and, thus, the contents of the
23 notice of default were not false. (See generally Complaint (#1-2)). Therefore, Plaintiff fails to
24 plead enough facts to state a claim for slander of title. Accordingly, the Court grants Trustee
25 Corps and Freddie Mac's motions to dismiss Plaintiff's sixth claim.

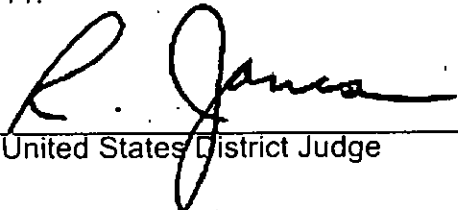
26 **CONCLUSION**

27 For the foregoing reasons, IT IS ORDERED that MTC Financial Inc. dba Trustee Corps'
28 Motion to Dismiss (#6) is GRANTED without leave to amend.

1 IT IS FURTHER ORDERED that Federal Home Loan Mortgage Corporation's Motion
2 to Dismiss (#12) is GRANTED without leave to amend.

3 IT IS FURTHER ORDERED that Flagstar, FSB and Joan H. Anderson's Motion to
4 Dismiss (#23) is GRANTED without leave to amend.

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6 Dated this 4th day of February, 2011.

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9 United States District Judge
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